

Exhibit A

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A P P E A R A N C E S: (Cont'd)

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(In open court.)

THE COURTROOM DEPUTY: *Mirkin, et al. v. XOOM
Energy, LLC, et al.*

Counsel, please state your name for the record.

MR. DOLAN: Good morning, Your Honor.

Richard Dolan and Brad Simon from Schlam Stone &
Dolan. I'll let the others introduce themselves for the
plaintiff.

MR. McINTURFF: Good morning, Your Honor.

Burkett McInturff from Wittels McInturff
Palikovic, on behalf of plaintiff and the class. And I have
with me my colleagues Andrey Belenky, Steven Wittels, and

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1 Ethan Roman.

2 THE COURT: Good morning.

3 MR. MATTHEWS: Good morning, Your Honor.

4 Matt Matthews for the defendant XOOM Energy.

5 MS. WIZIG: Diane Wizig for defendant XOOM Energy.

6 MS. SREEPRAKASH: Good morning, Your Honor.

7 Netra Sreeprakash for defendant XOOM Energy.

8 THE COURT: Great. So good morning, everybody.

9 I'm new to this case. It seems like there's a lot
10 going on here. Maybe the best way to start off would be
11 asking, from your perspective, on where things stand in this
12 case. I know there are a number of motions in front of me.
13 What I've got is motions *in limine* from plaintiff and from
14 defendants, and also a motion for reconsideration of
15 continued class treatment.

16 Is that what's on your list at this point?

17 MR. DOLAN: Yes, Your Honor.

18 And protocol, do you want us to address you from
19 the table, the podium, sitting, standing?

20 THE COURT: I would definitely stay at the table,
21 and whatever you all want in terms of sitting or standing is
22 fine with me. Sometimes people find it's easier to sit with
23 the mics.

24 MR. DOLAN: Yes, and some of us are old fashioned
25 and we tend to stand. But whatever.

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1 THE COURT: It doesn't matter to me at all.

2 MR. DOLAN: In terms of -- yes, I regret to say, I
3 think there are 34 motions pending in front of you.

4 THE COURT: It sounds like I undercounted by about
5 three, then.

6 MR. DOLAN: The reality is I think they circle
7 around the same basic themes and they come out in different
8 ways. My suspicion is when Your Honor gets into them,
9 you'll find that once you've done a couple of them, you're
10 going to find it fairly easy to get through most of them.

11 Our perspective on this case is it's a fairly
12 straightforward contract case. Judge Ross has already
13 construed the contract. It's basically a cost-plus
14 contract. The dispute really is about the inputs onto the
15 contract in the formula; what are the costs, what's the
16 margin, what's the rate. And there's only so much we can
17 say about that stuff.

18 I know you wanted to talk about the length of the
19 trial, and that will depend in part on what you do with
20 these motions because that impacts on the evidence that will
21 be allowed and the length and so on. We expect that
22 plaintiff's case will be fairly brief. We have basically
23 two live witnesses. Again, depending on what happens in all
24 these motions, that may change a little, but I'm not
25 expecting it. There will be some deposition read-in, there

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1 will be a lot of admissions and so on. Maybe three or four
2 days, that kind of thing. The real unknown is the length of
3 the defense case, and that will depend critically on what
4 Your Honor does with these motions.

5 We think that once the Court has gotten through
6 the major ones and we know where you're coming from, because
7 I don't know if you're going to issue one decision on a
8 whole bunch of them or you're going to do them seriatim, we
9 will have to update the pretrial order. The reality is when
10 both sides did this order back in I think May of 2024, we
11 were expecting the trial to look a little differently.
12 Since then, the experts have been largely cut back. There
13 may not be a damages case given how the judge has set it up,
14 and that has some wrinkles to it as well. The jury
15 instructions -- everything would basically have to be
16 re-tailored.

17 I took a look at Your Honor's instructions as to
18 how you want trials done. You want everything in binders.
19 It turns out a lot of the exhibits are these gigantic
20 spreadsheets. We can't possibly -- I mean, if we put them
21 in a binder, they're incomprehensible.

22 THE COURT: Yes, that's fine.

23 MR. DOLAN: My thought would be we would end up
24 loading them on a laptop or more than one laptop and giving
25 them to a jury because they're just incomprehensible to

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1 jurors otherwise. So there would be practical issues like
2 that, and I suspect the way to deal with that would be after
3 you've done what you're going to do, we have a Pretrial
4 Conference and we work out some of these practicalities.

5 In terms of when, again, a lot will depend on when
6 Your Honor can get to these things. I suspect that we're
7 not your only case -- that's just a guess -- and that you
8 have other dogs that are barking. I don't think it would
9 take long to get the pretrial order and all this other stuff
10 in shape, the instructions, get it all to Your Honor. We
11 would very much like a trial, if we could have one, maybe
12 this summer. Again, we'll have to play with that in terms
13 of how -- I realize we're at the end of March. It's not
14 that far from now.

15 I don't want to presume about, you know, what the
16 Court will be able to do and when you'll be able to do it,
17 but I do think that the case can be truncated and dealt with
18 in much -- the defense is talking about seven weeks for
19 their case. I don't think that's remotely realistic, and I
20 think once we have your rulings we'll be able to have a much
21 better -- my suspicion is it will be, max, a two-week trial.

22 THE COURT: Okay.

23 MR. DOLAN: Do you need anything else from me,
24 Judge?

25 THE COURT: No. That's helpful.

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1 MR. MATTHEWS: Good morning, Your Honor. Matt
2 Matthews. First let me say I appreciate plaintiff's counsel
3 and the Court's courtesy in moving the conference back based
4 on my conflict.

5 In terms of where we are, I think Mr. Dolan's
6 correct in saying the motion for reconsideration and then
7 the *limines*, from defense point of view, a lot of the
8 *limines* have been resolved by rulings that Judge Ross issued
9 after the *limines* were filed. There are I believe, let's
10 see, eight -- I'm sorry, seven from the defense perspective
11 that Judge Ross's decision that plaintiffs' expert's model
12 were excluded and her decision that good faith is not at
13 issue, we believe there's all seven of those motions.

14 With respect to defense motions and also because
15 of those rulings, we think at least six of those are
16 potentially dispositive.

17 THE COURT: What do you mean by "dispositive"?

18 MR. MATTHEWS: In terms of if good faith is not at
19 issue --

20 THE COURT: That those rulings are dispositive of
21 the motions that are pending.

22 MR. MATTHEWS: And potentially the case. If
23 reasonableness is not at issue, then an overcharge cannot be
24 proved.

25 THE COURT: This seems like a summary judgment

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1 issue. This doesn't seem like a motion *in limine* issue,
2 right?

3 MR. MATTHEWS: It was an issue -- the Court hadn't
4 construed the contract until summary judgment, and so that's
5 why these motions came subsequent to that. But based on the
6 Court's determination -- construction of the contract and
7 then her determination that good faith was not at issue,
8 that's what gave rise to those motions.

9 THE COURT: Got it. But you filed motion for
10 summary judgment at some point in the case?

11 MR. MATTHEWS: Yes.

12 THE COURT: And summary judgment, I take it, was
13 denied because we're here?

14 MR. MATTHEWS: It was denied.

15 THE COURT: I guess I'm just not seeing how there
16 could be a motion that is dispositive of the case at this
17 point. That sounds like a summary judgment motion or
18 conceivably a motion to dismiss.

19 MR. MATTHEWS: I think it could be construed that
20 way, for sure. For example, the plaintiffs don't have an
21 implied -- if I can --

22 THE COURT: Yes, go ahead.

23 MR. MATTHEWS: The plaintiffs don't have an
24 implied covenant claim; it was dismissed. They disclaimed
25 it at the Second Circuit. They said they were not pursuing

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1 that and they were not pursuing any claim that was based on
2 the reasonableness of XOOM's conduct or good faith. The
3 Second Circuit affirmed that dismissal.

4 So now we're back here with a construction of the
5 contract that says that XOOM's rate will be based on its
6 actual and estimated supply cost and a reasonable and
7 proportion at margin. But the only source of that
8 reasonableness is the implied covenant. It's not expressly
9 in the contract.

10 And so while the implied covenant always exists in
11 a contract, that doesn't necessarily mean that you always
12 have a claim on it. If that reasonableness claim can't be
13 put forward to the jury because it's been dismissed and
14 affirmed by the Second Circuit, then they can't offer
15 evidence of whether or not XOOM's margins were reasonable,
16 which means necessarily they can't prove an overcharge under
17 the Court's contract construction.

18 THE COURT: Did you present this argument in your
19 summary judgment motion?

20 MR. MATTHEWS: The Court hadn't construed the
21 contract at that point.

22 THE COURT: But, I mean, I guess you could present
23 your theory of what the contract is in your summary judgment
24 motion, right?

25 MR. MATTHEWS: We argued for a different contract

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1 construction than the one that the Court ultimately ruled
2 on.

3 THE COURT: I see.

4 MR. MATTHEWS: So that issue touches on defense's
5 five different motions *in limine* --

6 THE COURT: I guess I'm just not seeing how this
7 is a motion -- if it's a motion that plaintiff loses and you
8 win, I'm just not seeing how this is presented as a motion
9 *in limine*. What you would like me to exclude -- ultimately
10 what you want is not the exclusion of evidence, right?

11 MR. MATTHEWS: It is the exclusion of evidence;
12 reasonability as to the margin.

13 THE COURT: Okay. Well, if it's a motion about
14 exclusion of evidence, that's a fine motion *in limine*. If
15 it's a motion that you win, that's not a motion *in limine* to
16 me.

17 MR. MATTHEWS: We'd be happy to file a limited
18 summary judgment on that issue, if the Court would entertain
19 it.

20 THE COURT: Well, I'm not sure that this is the
21 time for that. It seems like you should have filed your
22 summary judgment motion when you did file your summary
23 judgment motion.

24 MR. MATTHEWS: We did file by the deadline.

25 THE COURT: Right.

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1 MR. MATTHEWS: If the Court believes it is better
2 construed as a motion for summary judgment and would like a
3 briefing from both parties on that issue --

4 THE COURT: Well, I don't know enough about this
5 to suggest something like that. I'm just trying to sort of
6 wrap my head around the case so that I can deal with this
7 case in the most efficient way possible. So kind of where I
8 thought we were when I was assigned this case is pretty
9 close to trial, with some evidentiary disputes to resolve
10 before trial. And so it just worries me when somebody tells
11 me a version somewhat different.

12 MR. MATTHEWS: I understand. I think this is a
13 product of the series of the Court's rulings and Judge
14 Ross's ruling excluding plaintiffs' expert, and also said
15 that she -- it made reference to revisiting earlier rulings.
16 So that's, I think --

17 THE COURT: What do you mean made reference to it?

18 MR. MATTHEWS: She said this may mean -- she
19 didn't say it definitely means, but she said this ruling may
20 mean that the Court should revisit earlier rulings.

21 THE COURT: I see. Okay.

22 MR. MATTHEWS: She did not, but that would be the
23 basis for rearguing this issue as a summary judgment.

24 THE COURT: Okay. Can I ask, what I think I have
25 pending are a motion for reconsideration related to class

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1 treatment and some motions *in limine*, which are things that
2 I understand to be about the inclusion or exclusion of
3 evidence at trial. Is that what you agree is on my plate?
4 And the next thing to do in this case is going to be to
5 resolve that set of motions, and then after that we're going
6 to try this case?

7 MR. MATTHEWS: That's correct. We don't believe
8 it should be tried, but yes, that is the order of operation.

9 THE COURT: Well, I know that you don't and you
10 moved for summary judgment. But if you are anticipating a
11 whole bunch of additional briefing on something, and I'm not
12 sure if that's timely or appropriate now, but I would
13 definitely want to know that, which is something that I'm
14 kind of getting from what you're saying, right? That Judge
15 Ross issued this order which suggested the position should
16 be resisted, but you haven't filed a motion that actually
17 seeks to revisit them, and then you actually think that the
18 motions *in limine* present grounds for dismissing plaintiffs'
19 claims, actually granting summary judgment on the claims.

20 I'm just having a hard time aligning your
21 description of the case with what I've actually got in front
22 of me. What I'd like to do in this case is resolve what
23 I've got in front of me and then try the case. If you'd
24 like to do something different, I'd like to resolve that
25 today.

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1 MR. MATTHEWS: If the Court believes that those
2 issues are better briefed in a motion for summary judgment,
3 then I'll ask for leave to file summary judgment on that
4 issue, with Judge Ross's statement that her rulings might
5 make revisiting summary judgment appropriate.

6 THE COURT: Okay. And I think as you probably
7 have a sense, I don't know nearly about the case as you
8 guys. I know pretty little about the case at this point. I
9 held this conference as much as anything to get a better
10 sense of where we are.

11 So I'm not expressing a view on whether a motion
12 for summary judgment would be appropriate. I'm just
13 expressing the view that in considering a motion *in limine*,
14 the outcomes I would contemplate are granting a motion to
15 exclude the evidence that's discussed in the motion or
16 denying that, or conversely, if it's a motion to offer some
17 evidence, saying it can come in or it can't. So these are
18 the outcomes that I think are on the table at this point,
19 and then reconsideration of class treatment.

20 If there's a different outcome that you are
21 looking for in this case, I do think you would need to file
22 a different type of motion. And I'm not expressing a view
23 on whether that is timely. I'm expressing probably a little
24 skepticism about whether that's timely. But I'm just not as
25 familiar with the case.

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1 MR. MATTHEWS: I understand. The motion for
2 reconsideration did ask that the Court revisit summary
3 judgment, that we bring it up at that point.

4 THE COURT: Okay. So you think that's
5 encompassed? It might be. You think it's encompassed in
6 your class treatment motion already, so you don't need to
7 file a separate motion about it?

8 MR. MATTHEWS: That's right.

9 THE COURT: Okay.

10 MR. MATTHEWS: Real briefly on the other issue of
11 timing that Mr. Dolan raised, we agree that the joint
12 pretrial report would be best amended to clean things up;
13 not to add. But just once the Court has ruled on
14 reconsideration and the *limines*, we can confer, clean that
15 up, and refile. And then in terms of the timing of that, I
16 think we can talk about it, but I would imagine we could get
17 that on file within 60 days after the Court had ruled on all
18 the motions given all the back and forth that we'll have to
19 go through on that. We haven't discussed that yet.

20 THE COURT: Have you thought about the timing of
21 trial from your perspective? I'm not making any promises
22 about the summer, but if you both told me you wanted the
23 summer, that would be something I would see if I could do.

24 The thing is that if you tell me that you're going
25 to need 60 days to file a revised Joint Pretrial Order after

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1 I issue decisions, and then I think we have to talk about
2 the length of the defense case. Those are not things that
3 are not going to be compatible with a summer trial, I think,
4 right? Because if I issued decisions on in this two
5 weeks -- which is not going to happen, that's too soon --
6 then 60 days from then we would be basically at June 1st,
7 and that's not going to give us enough time to try the case
8 in the summer, I think. And also if you were really telling
9 me you were going to have a six-week case, and I don't
10 really see that from who you've told me about who your
11 witnesses are in the Joint Pretrial Order, I don't think
12 that's going to happen in the summer. I just don't think I
13 can squeeze it in.

14 MR. MATTHEWS: In terms of the trial lengths, the
15 Joint Pretrial Order was filed a year ago and there have
16 been a lot of big rulings since then. So given those
17 rulings and just given some of the disciplined review that
18 we did of our own exhibits given Judge Ross's orders about
19 supplementing information on that evidence, we've thought
20 hard about it and believe that we can present it in a much
21 shorter fashion.

22 The case is -- I mean, I would disagree with
23 Mr. Dolan that it's simple and straightforward. It's an
24 overcharge case. It involves monthly rate decisions for 44
25 different rates over 12 years and, you know, hundreds of

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1 rate-setting workbooks, and as the Court has seen from our
2 evidentiary submissions, hundreds of other documents that
3 bear on the actual cost.

4 But we don't plan to torture the jury with a
5 monthly presentation of every single meeting. We would take
6 representative examples from different points in time. I
7 think it would, of course, be impacted by the Court's
8 rulings on some of these other motions, but I think that we
9 could do that in two weeks; two to three.

10 THE COURT: Okay. So I think the ball's really in
11 my court to resolve these motions next. I don't think I can
12 set a trial date as we sit here today because it sounds like
13 there's a lot of variables about what the trial is going to
14 look like that depend on resolving the motions, and then
15 you're all giving me a revised Joint Pretrial Order. So
16 I'll resolve those motions as soon as I can.

17 I'm taking your representation that you don't
18 think we need a round of additional briefing on some other
19 issue. Please don't tell me after I resolve the motions *in*
20 *limine* that you want to brief some of the other stuff. Now
21 would be the time to tell me that you want to brief some
22 other stuff, because I want to move this case towards trial.

23 MR. MATTHEWS: Can I confer with my colleagues
24 briefly?

25 THE COURT: Yes.

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1 MR. MATTHEWS: Thank you.

2 (Pause in proceedings.)

3 MR. MATTHEWS: Judge, I think if the Court were to
4 rule our way on the motions *in limine*, then we would -- from
5 our point of view, the plaintiff would have no evidence of
6 key elements of their case. Well, on the motion for
7 reconsideration, it would mean they have no -- there's no
8 fact question on actual costs or whether the rate-setting
9 workbooks represented both estimated and actual. And on
10 motions *in limine* 1 through 5, it would mean that they don't
11 have evidence of a reasonable margin and that would be
12 dispositive. I think at that point, and I know you said you
13 don't know about that timing, but that a summary judgment
14 would be appropriate at that point if they don't
15 have evidence of --

16 THE COURT: I'm pretty skeptical that -- I mean,
17 that's just not how I think these things normally unfold.
18 You don't normally do motions *in limine* and then do summary
19 judgment briefing after that. You might do a summary
20 judgment motion at the outset that says -- that's basically
21 what a summary judgment motion is, right, that there's no
22 admissible evidence that your opponent would offer. So I
23 get it that maybe they won't be able to -- they'll stand up
24 and they'll say we think you should find X, but we have no
25 evidence of X --

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1 MR. MATTHEWS: I guess if motions *in limine* 1
2 through 5 are granted, then the jury wouldn't even be told
3 that a reasonable margin had to be part of the contract.
4 Again, as I said, the order of this is -- we didn't argue
5 for that contract construction in summary judgment. It's
6 something that came afterwards.

7 THE COURT: Yes. Okay. What I'm hearing is you
8 don't want to file additional motions, and so I'm going to
9 move to deciding the motions *in limine*. I guess if we reach
10 a point where plaintiffs' evidence was excluded, I guess we
11 can talk about what happens at that point. But I am not
12 going to have an additional round of summary judgment
13 briefing at that point. It's too late in the case at that
14 point. So if that's the stage you want to revisit, I'm not
15 sure I would revisit it, but I want to do it now before I do
16 motions *in limine* and trial.

17 I think we kind of beat this horse a bunch, but
18 that's where I am. So I'm going to decide the motions *in*
19 *limine*, and then I'm going to assume the next thing is going
20 to be a trial in this case.

21 MR. MATTHEWS: If the motion for reconsideration
22 is not --

23 THE COURT: Right.

24 Okay. Anything else we should talk about?

25 MR. DOLAN: From our perspective, Judge, we look

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1 forward to seeing you after the motions are decided, and I
2 think at this point we'll have a lot to talk about. But
3 today, probably not.

4 MR. MATTHEWS: If the Court would like argument on
5 any of the pending motions, the reconsideration motion or
6 any of the *limines*, we're prepared to do that.

7 THE COURT: Fair enough. And if I get to a point
8 where that would be helpful, I will arrange that. I
9 generally don't do arguments on motions. It's kind of only
10 if there's something that, after reading all the briefing, I
11 feel like wasn't explored in the briefing, which I have a
12 sense is not going to be the case here. So just for
13 you-all's planning, it's generally not my practice, but
14 could be because this case is complicated.

15 MR. MATTHEWS: Thank you, Your Honor. We
16 appreciate that.

17 THE COURT: So I think the idea of submitting a
18 revised Joint Pretrial Order down the road makes a lot of
19 sense. My kind of ask in advance is, please try to work
20 with each other on both having your list of exhibits and
21 that everybody is giving their sort of good faith version,
22 not like every document in the case just in case.

23 And then also then on objections, please give
24 reasonable objections. Sometimes, and I think in what I've
25 seen here there's some of the, like, we object to every

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1 witness on relevance and also they might try to offer a
2 document that's inadmissible, and that's just not that
3 helpful.

4 So if you guys can narrow things down a little bit
5 in the Joint Pretrial Order, it just makes everything
6 easier. I'm sure you will do that, but just flagging my own
7 strong preference.

8 MS. WIZIG: Your Honor, I just want to clarify
9 that you want the next version of the Joint Pretrial Order
10 to be somewhat of a subset of the prior one, and that
11 neither party is allowed to add witnesses or exhibits. Is
12 that accurate?

13 THE COURT: I wasn't anticipating that you would
14 be. What you both have described to me is that Judge Ross's
15 rulings have narrowed the case and so you-all think you can
16 give me a more refined Joint Pretrial Order, and I would be
17 surprised if either party came in and said that we have a
18 whole bunch of additional witnesses and exhibits. That's
19 not what I'm getting from you-all. But I'm not making a
20 ruling on what would happen if you did. It doesn't seem
21 like it would be a great idea. I mean, the idea of a Joint
22 Pretrial Order, which you've given me, is to narrow the case
23 a little bit.

24 MS. WIZIG: That would absolutely be our
25 intention, would be to narrow it.

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1 MR. DOLAN: Judge, all I can say is we're talking
2 about events that we -- we don't know what you're going to
3 say in those motions.

4 THE COURT: Yes.

5 MR. DOLAN: And if you say you can't do it this
6 way, maybe you'll do it a different way. You saw that,
7 frankly, when Judge Ross issued one of her rulings excluding
8 the second report of our expert, and then she called for
9 briefing. Just reading between the lines, maybe there was a
10 slight degree of skepticism by the judge that it would
11 continue, and then we convinced her it should. I don't know
12 that that will happen when you issue rulings.

13 But the future -- as some wise men said,
14 predictions are hard, especially about the future. That's
15 what we're dealing with right now. The exhibits may change.
16 They may change.

17 THE COURT: I think we shouldn't fight over this
18 now because it's all hypothetical. If you have a bunch of
19 new exhibits, we can talk about it when you offer those.

20 MR. DOLAN: Sure.

21 MS. WIZIG: Understood.

22 THE COURT: I'll try to get to this as soon as I
23 can. It's going to take me a little time to really get up
24 to speed on what's going on in this case since there's a lot
25 of water under the bridge and it's got some complexity to

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1 it. But I appreciate you-all coming in and helping me
2 understand where we are.

3 Thank you.

4 MR. DOLAN: Thank you, Judge.

5 MR. MATTHEWS: Thank you, Judge.

6 (Matter adjourned.)

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8 * * *

9
10 CERTIFICATE OF REPORTER

11 I certify that the foregoing is a correct transcript of the
12 record of proceedings in the above-entitled matter.
13

14 /s/ Kristi Cruz

15 _____
16 Kristi Cruz RMR, CRR, RPR
17 Official Court Reporter
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